THE SUPREME COURT OF THE STATE OF ALASKA

JEFFREY J. BERG, Appellant, v. SHANNON L. VANDERVEST, Appellee.	)	Supreme Court No. S-13136 Superior Court No. 1PE-95-00008 CI MEMORANDUM OPINION AND JUDGMENT* No. 1364 — June 23, 2010

Appeal from the Superior Court of the State of Alaska, First Judicial District, Petersburg, David V. George, Judge.

Appearances: Fred W. Triem, Petersburg, for Appellant. Shannon Vandervest, pro se, Petersburg.

Before: Carpeneti, Chief Justice, Fabe, Winfree, Christen, and Stowers, Justices.

I. INTRODUCTION

Jeffrey Berg made a mistake in preparing his taxes for several years, including those taxes used by the superior court to calculate his child support obligations in 2006. When he discovered the mistake, Berg contacted the Child Support Services Division (CSSD), which then moved the superior court for modification of Berg's child support obligations on the basis of changed circumstances. Berg filed an affidavit and

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* Entered pursuant to Appellate Rule 214.

memorandum in support of CSSD's motion and moved on his own to vacate the 2006 order setting child support. After it received additional information suggesting that Berg may have supplemental income from the sale of real estate and other items, CSSD withdrew its motion to modify. The superior court took no further action on the motion, despite the fact that Berg had filed his own affidavit and memorandum in support of CSSD's motion to modify. Because Berg's affidavit and memorandum in support of CSSD's motion made clear his goal of receiving a modification of his child support obligations, we conclude that the superior court was obligated to instruct him how to proceed in seeking that relief, even after CSSD's motion was withdrawn. Berg also moved to vacate the child support order. We agree with the superior court that Berg's tax error was properly characterized as a mistake under Alaska Civil Rule 60(b)(1) and uphold the court's ruling that Berg's motion to vacate was untimely.

II. FACTS AND PROCEEDINGS

Jeffrey Berg and Shannon Vandervest were granted dissolution of their marriage on April 26, 1995. The superior court incorporated a written agreement between the parties into their divorce decree, which awarded shared custody of their three children with no requirement of child support payments.

In July 2005 Vandervest moved the court to modify the parties' custody arrangement. After a hearing in February 2006, the parties reached a new agreement that stated that child support obligations would be calculated under the shared custody formula in Alaska Civil Rule 90.3(b) and agreed that child support obligations would commence in March 2006. In March 2006 the superior court adopted the parties' agreement in its entirety and made it an order of the court. On May 11, 2006, the superior court issued an order on child support and medical issues that summarized the

parties' earlier agreement and resolved several of the remaining disputes between the parties concerning the calculation of monthly child support obligations.

Because the parties' income as self-employed fishers fluctuates from year to year, the superior court decided that "the most accurate way to determine likely future income in order to calculate a reasonable current child support obligation" was to use an averaging technique that took the previous three years of earnings into account. The order also stated that capital gains from Berg's regular and recurring sales of real estate would be included as part of his income for purposes of this calculation. In response to Berg's concern that Vandervest was deducting business expenses that included accelerated depreciation in violation of Civil Rule 90.3, the court required Vandervest to submit additional documentation to prove that she was not using accelerated depreciation in calculating her income. Finally, the superior court reiterated the parties' agreement that Vandervest would provide insurance for their children and that the parties would share uncovered medical costs equally.

In August 2006 the superior court issued an order setting child support that recalculated Vandervest's net income based on straight-line depreciation for 2003, 2004, and 2005 and then averaged the three numbers. Berg's income for the same three years was calculated and averaged, including his capital gains from property sales.[1] Berg's monthly child support obligation was set at $707.81 until the parties' middle daughter's emancipation in May 2007, at which time it was reduced to $524.31.

In September 2007 Berg received notification from the Internal Revenue Service (IRS) that he had filled out the wrong tax forms, given his treatment of his

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[1] Berg's income for child support purposes in 2004 was $91,793, which had a significant impact on his average income, given that his income was $11,749 for 2003 and $12,270 for 2005.

corporation, Katrina Ann Inc., as an "S" corporation. Berg's amended returns reported adjusted gross incomes that were less than the income shown on the returns that he submitted for each of the years used to calculate his child support obligations.

On February 12, 2007, the State of Alaska's Child Support Services Division (CSSD) received a Request for Modification of Child Support from Berg. CSSD requested income information from both parties through a "Notice of Petition for Modification of Judicial Support Order" but did not receive a response from Vandervest.[2] Without the benefit of both sides' financial information, CSSD assumed that Berg and Vandervest, who were both self-employed commercial fishers, had the same earning ability and concluded that their shared custody arrangement should result in no child support due from Berg.

On January 10, 2008, CSSD moved the court to modify Berg's child support obligations retroactive to March 1, 2007, which was the month following the notice of petition for modification, and to issue an order for medical support. In addition to its motion to modify child support, CSSD filed a memorandum in support of its motion and an affidavit from a CSSD employee explaining CSSD's recommendation that Berg not be required to pay child support. CSSD notified both Berg and Vandervest of their opportunity under Civil Rule 77 to file a written response or opposition to the motion to modify. Vandervest opposed the motion, indicated that she had submitted the requested

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[2] Vandervest claimed that she sent her 2004-2006 tax returns, including Schedule C's, to CSSD when she returned from an out-of-town fishing trip in October 2007. It is not clear from the record why CSSD did not receive this information in the fall of 2007.

financial information to CSSD the previous October, and reattached the same package of information to her opposition.[3]

On January 24, 2008, Berg filed an affidavit and memorandum in support of CSSD's motion to modify along with an expedited motion to vacate the August 2006 order setting child support. Berg's memorandum in support of the CSSD motion stated that Berg "fully support[ed] and agree[d] with the reasons, conclusions, and actions" contained within CSSD's submissions to the court and further argued that Vandervest had not met her obligation to provide medical insurance. In addition to stating his support for CSSD's motion, Berg also moved for the August 2006 order to be vacated because the child support award was based on financial information that had been miscalculated due to his tax mistake.

CSSD requested an extension in order to review the financial information provided by Vandervest and opposed Berg's motion to vacate the August 2006 order. The court granted CSSD's motion for an extension of time and declined to consider Berg's motion to vacate on an expedited basis, instead stating that the motion to vacate would "be decided after full briefing." After taking time to review the information submitted by Vandervest, CSSD was "unable to substantiate a 15 percent change in the parties' income" and therefore withdrew its January 10 motion to modify.

On May 2, 2008, the superior court denied Berg's motion to vacate the August 2006 child support order. The superior court treated CSSD's motion to modify as withdrawn and did not address it further, except for mentioning in a footnote that Berg's amended taxes changed his tax liability rather than his income for purposes of

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[3] In addition to providing the financial information requested by CSSD, Vandervest provided several documents, including advertisements posted by Berg for property and equipment being sold, suggesting that Berg continued to have supplemental income.

calculating child support under Rule 90.3. The court considered Berg's motion to vacate the August 2006 child support order as a Civil Rule 60 motion for relief from judgment. First, the superior court concluded that none of the minor clerical errors highlighted by Berg justified the requested relief under Rule 60(a) because there was no prejudice to the outcome of the case. Next, the court addressed the amendment of Berg's personal tax returns for 2004, 2005, and 2006 under Rule 60(b)'s provisions for mistake and new evidence and concluded that Berg's motion was untimely.[4] In order to respond to Berg's assertion that Vandervest had not complied with the court's order to provide health insurance for the children, the superior court requested that Vandervest submit proof of continuous health insurance coverage since the May 2006 court order.

Berg appeals this May 2008 order of the superior court. Berg contends that the superior court should have considered Berg's pro se memorandum in support of CSSD's motion to modify to be a joinder in that motion and thus reached the merits of the motion to modify. He also argues that the superior court mischaracterized his January 2008 motion to vacate as a Rule 60(b)(1) or (b)(2) motion when it was actually a Rule 60(b)(6) motion that was timely and should have provided a basis for relief.

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[4] A motion under Rule 60(b) "shall be made within a reasonable time" and when the motion is based on mistake or newly discovered evidence, such a motion must be made "not more than one year after the date of notice of the judgment or orders." Alaska R. Civ. P. 60(b). The order Berg was seeking to vacate was dated August 2, 2006. Even giving Berg the benefit of the September 10, 2006 date when he claims he received the order, his motion to vacate filed January 24, 2008 was more than four months late.

III. STANDARD OF REVIEW

We "review for abuse of discretion a court's decision on guidance to a pro se litigant."[5] We also consider a superior court's decision on whether to grant relief from judgment under Civil Rule 60 under the abuse of discretion standard.[6] We will find an abuse of discretion if we are left with a "definite and firm conviction" that the lower court made a mistake after our review of the entire record.[7]

IV. DISCUSSION

A. The Superior Court Should Have Instructed Berg On How To Proceed After CSSD's Motion To Modify Was Withdrawn.

Berg argues that the superior court erred in failing to treat his "Affidavit and Memorandum in Support of CSSD Motion to Modify Support" as a joinder or as a separate motion to modify. Although Berg's submission was "in support" of CSSD's motion, he contends that the superior court should have recognized that he was "obviously attempting" to join CSSD's motion to seek modification of his child support obligations. Because Berg was not represented by counsel at the time that he submitted this affidavit and memorandum, he now argues that the superior court should have held

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[5] *Snyder v. Am. Legion Spenard Post No. 28*, 119 P.3d 996, 1001 (Alaska 2005).

[6] *Fleegel v. Estate of Boyles*, 61 P.3d 1267, 1278 n.51 (Alaska 2002) (citing *Hatten v. Hatten*, 917 P.2d 667, 670 n.3 (Alaska 1996)).

[7] *Id.* at 1270.

his pleadings to a "less stringent standard than those of lawyers"[8] and informed him of the specific defects in his pleadings.[9]

Vandervest counters that the trial court had no reason to believe that Berg's memorandum in support was intended to serve any purpose beyond simply supporting CSSD's motion to modify given its language stating, "I fully support and agree with the reasons, conclusions, and actions [] contained within the [CSSD motion to modify] packet."

We agree with Vandervest that the superior court's interpretation of Berg's affidavit and memorandum as simply supportive of CSSD's motion was appropriate before the motion to modify was withdrawn. Prior to the withdrawal of this motion, there was no reason that Berg would have thought it necessary to file his own motion to modify, as his filing clearly indicated that he was seeking the same relief CSSD requested: modification of his child support obligation. CSSD's existing motion would thus have been sufficient to accomplish these ends.

But once CSSD's motion was withdrawn, leaving no active motion before the superior court, Berg was left without a vehicle for requesting modification relief on his own behalf. At this point, the superior court had a duty to "inform [the] pro se litigant of the proper procedure for the action he . . . is obviously attempting to accomplish."[10] Because Berg initiated this case by submitting his own request for modification of child support to CSSD and because he filed a document with the court that indicated his wish to receive the relief requested in the CSSD motion, we conclude that his goal of receiving

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[8] *Hymes v. Deramus*, 119 P.3d 963, 965 (Alaska 2005) (quoting *Fyffe v. Wright*, 93 P.3d 444, 452 n.17 (Alaska 2004)).

[9] *See Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987).

[10] *Id.*

a modification of his child support obligation was clear.[11] It certainly would have been appropriate for the superior court to view Berg's filing in support of CSSD's motion as his joinder in that motion. But if the court elected not to treat Berg's filing as a joinder, then the superior court had a duty to instruct Berg about what procedural steps would allow him to pursue both prospective modification of his child support obligations and relief that would be effective as of the first day of the month after Vandervest received notice of CSSD's petition.

Although Vandervest argues that our holding in *Bauman v. State, Division of Family & Youth Services* counsels caution in requiring judges to "instruct a pro se litigant as to each step in litigating a claim,"[12] *Bauman* is easily distinguished from the situation presented by this case. In *Bauman*, the pro se plaintiffs "failed to submit even a defective motion," leading us to decline to extend the requirement that a judge "warn pro se litigants on aspects of procedure."[13] Here, by contrast, Berg not only filed a document with the superior court that clearly indicated what relief he desired, but that filing was procedurally correct at the time because CSSD had already filed the operative motion. It was only after CSSD withdrew its motion that Berg was left without a mechanism to pursue modification of his child support obligations under Civil

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[11] We have explicitly recognized that there are several advantages gained by a party who allows CSSD to pursue modification of the party's child support order rather than bringing an individual motion, such as having a lawyer participate to help avoid procedural pitfalls and receiving the benefit of having the modification apply retroactively to the date when the non-requesting party received the petition for modification. *Allen v. State, Dep't of Revenue, Child Support Enforcement Div.*, 15 P.3d 743, 747 (Alaska 2000).

[12] 768 P.2d 1097, 1099 (Alaska 1989).

[13] *Id.* (citing *Breck*, 745 P.2d at 75).

Rule 90.3(h). If the superior court did not wish to view Berg's filing in support of CSSD's motion as a joinder, it was required to inform Berg of the procedural steps necessary to seek modification relief.

The withdrawal of CSSD's motion was likely not anticipated by either Berg or the superior court when the affidavit and memorandum in support was filed. Because Berg was a pro se litigant and had demonstrated "a good faith attempt to comply with judicial procedures and to acquire general familiarity with and attempt to comply with the rules of procedure,"[14] the superior court had the responsibility to either interpret Berg's existing filing in such a way that the motion to modify survived or to provide him with information on what steps he needed to take to file his own motion for potential retroactive relief after CSSD withdrew its motion. We therefore conclude that the superior court's decision to consider the motion withdrawn without providing Berg an opportunity to resurrect the motion was error.

Vandervest's counsel suggested at oral argument that any possible error was harmless because the superior court at least partially considered the merits of Berg's modification claim and concluded that his "amended taxes for 2003, 2004 and 2005 may have changed his tax liability; they did not change his income for purposes of calculating child support under 90.3." But because the record does not contain a full Civil Rule 90.3(h) calculation demonstrating whether the updated tax numbers constituted a material change in circumstances, we are unable to conclude either that the superior court examined the merits of the modification claim or that the failure to provide the required direction to Berg was harmless error. Accordingly, we remand for further proceedings on Berg's Rule 90.3(h) claim.

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[14] *Gilbert v. Nina Plaza Condo Ass'n*, 64 P.3d 126, 129 (Alaska 2003).

B. Berg's Motion To Vacate Was Properly Characterized As A Rule 60(b)(1) Motion And Was Therefore Untimely.

Berg argues that the superior court improperly failed to characterize his motion to vacate the child support order as a Civil Rule 60(b)(6) motion. Although Berg's motion to vacate did not mention Civil Rule 60 at all, the superior court considered Berg's arguments under Rule 60(a)'s provision for clerical mistakes, under Rule 60(b)(1)'s provisions for mistake, inadvertence, surprise, or excusable neglect, and under Rule 60(b)(2)'s provision for newly discovered evidence. Berg does not challenge the superior court's decision that Rule 60(a) was inapplicable or its decision that a motion based on Rule 60(b)(1) or (b)(2) would be untimely.[15] Instead, Berg argues that his motion should have been characterized as a Rule 60(b)(6) motion, which allows for relief from an order for "any other reason justifying relief from the operation of the judgment," and that failure to consider it as such was error.

Vandervest responds that Rule 60(b)(6) is "to be employed only when grounds other than those specified in the preceding clauses (1) through (5) have been demonstrated" and characterizes Berg's motion as a "classic" example of a 60(b)(1) or (b)(2) motion. Vandervest also maintains that "Berg's motion is an impermissible attempt to circumvent Rule 60(b)'s time limits." Finally, she asserts that "even if [Berg] had made a timely and procedurally correct motion," he would not have been entitled to relief.

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[15] As the superior court noted, a motion under Rule 60(b) must "be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c)." Alaska R. Civ. P. 60(b). "Alaska Civil Rule 6(b) explicitly denies courts the ability to enlarge Rule 60(b)'s one-year period . . . ." *Vezey v. Green*, 171 P.3d 1125, 1129 n.15 (Alaska 2007).

Berg's motion to vacate focused on his inability to pay the ordered support because the figures that the trial court used in calculating his obligations were "disproportionately high" due to his mistake in preparing the tax returns that he submitted to the court. We have expressly held that Rule 60(b)(6) "is reserved for extraordinary circumstances not covered by the preceding clauses" of Rule 60(b).[16] When a party's circumstances appropriately fit under the umbrella of any of the first three clauses, Rule 60(b)(6)'s catch-all provision cannot be used to escape the strict one-year time limit of clauses (b)(1)-(3).[17]

The superior court assumed that the change in Berg's tax information constituted at most either mistake and inadvertence under Rule 60(b)(1) or newly discovered evidence under Rule 60(b)(2). Because the change in tax documents resulted from an allegedly mistaken characterization of Berg's income and not newly discovered evidence of that income, we focus our attention on Rule 60(b)(1).[18] The numbers used by the superior court in calculating the child support order were not an assumption that both parties relied on,[19] but rather were determined by the court after considering the

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[16] *Neilson v. Neilson*, 914 P.2d 1268, 1272 (Alaska 1996) (quoting *O'Link v. O'Link*, 632 P.2d 225, 229 (Alaska 1981)).

[17] *See Williams v. Crawford*, 982 P.2d 250, 255 n.16 (Alaska 1999) ("The fact that relief under one of the first five clauses is time-barred does not render it allowable under clause six."); *Neilson*, 914 P.2d at 1272.

[18] The superior court similarly concluded, in addition to ruling that the motion was untimely under clauses (1) and (2), that the amended taxes "would not constitute new evidence under [R]ule 60(b)."

[19] *See generally Williams*, 982 P.2d at 255-56 (holding that the standard for relief under Rule 60(b)(6) is met when a fundamental underlying assumption that both parties believed to be valid was actually incorrect).

evidence, in the form of tax documents, submitted by the parties.[20] We therefore conclude that the superior court did not err in characterizing Berg's motion to vacate as a Rule 60(b)(1) motion and concluding that it was untimely, having been filed well past the one-year deadline for 60(b)(1) motions.

V. CONCLUSION

We AFFIRM the superior court's holding that Berg's motion seeking to vacate the court's child support order based on changes in his tax information is best considered a Rule 60(b)(1) motion and is therefore untimely. But we hold that the superior court's failure to instruct Berg on how to accomplish his objective of seeking modification of his child support obligations after CSSD withdrew its motion to modify was error and REMAND for proceedings on the merits of the modification claim.

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[20] For example, the parties disagreed about whether the income from Berg's sales of real estate should be included and disagreed about whether Vandervest could use accelerated depreciation in calculating her income. The superior court used the evidence submitted by the parties to calculate their net income for child support purposes and then determine their respective child support obligations.